No. 91-5118

In the Supreme Court of the United States

OCTOBER TERM, 1991

DERRICK MORGAN, PETITIONER,

v.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS is an organization made up of criminal defense attorneys in private practice, public defenders and law professors dedicated to the preservation of constitutional rights as well as education of its membership and the public.

Amicus agrees with petitioner that he has a constitutional right to inquire of a venire in a capital case

whether potential jurors would automatically impose the death penalty if the defendant were convicted of murder and to have such potential jurors excused for cause.

Opposing counsel has consented to the filing of this brief. A letter indicating such consent has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Jurors who would automatically impose the death penalty for a defendant convicted of murder should not serve on a sentencing jury. To do so would deny the defendant his Sixth and Fourteenth Amendment guarantee of an impartial jury and eviscerate the logic espoused by this Court with regard to the identification and exclusion from jury service of individuals biased by their personal views on capital punishment. Recent studies reveal that individuals who would automatically impose the death penalty ("ADPs") represent a significant and identifiable portion of the potential juror pool. Moreover, the studies indicate that ADPs, similar to jurors who would survive a *Witherspoon* inquiry, are not always identified in response to basic questions about a juror's ability to act fairly or to follow the law. Even absent this statistical data, however, due process dictates that the capital defendant have the benefit of a presumption that ADPs exist, just as the Court has supported the "death qualification" of jurors with a presumption in favor of the State. Denying the capital defendant the ability to inquire whether a juror would automatically impose a death sentence upon a finding of guilt, or failing to eliminate such a juror for cause, violates the defendant's right to a fair and impartial jury.

I. IT IS FUNDAMENTALLY UNFAIR AND A DENIAL OF DUE PROCESS TO PROHIBIT INQUIRY TO DISCOVER WHETHER A POTENTIAL JUROR WILL AUTOMATICALLY IMPOSE A SENTENCE OF DEATH TO ONE CONVICTED OF A CAPITAL CRIME

A. The Presence On the Jury of a Juror Who Will Automatically Impose Death Denies a Defendant His Sixth and Fourteenth Amendment Guarantee of an Impartial Jury

"[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois*, 391 U.S. 510, 521-522 (1968). *See also Lowenfeld v. Phelps*, 484 U.S. 231, 258 (1988); *Lockhart v. McCree*, 476 U.S. 162, 179 (1986). To effectuate that doctrine, and thus protect a defendant's guarantee of an impartial jury under the Sixth and Fourteenth Amendments, this Court has recognized that a trial court must excuse for cause a juror who would automatically impose the death penalty on a defendant convicted of a capital crime. *Ross v. Oklahoma*, 487 U.S. 81, 83-85 (1988); *Stroud v. United States*, 251 U.S. 15, 20-21 (1919).

The relief sought in the instant case is consistent with, and a logical extension of the Court's ruling in *Ross*. In *Ross*, the Court considered the constitutional effect of a trial court's failure to excuse an ADP juror for cause. Because the defense attorneys in *Ross* excluded the ADP juror through use of a peremptory challenge, this Court denied the defendant's request for a new sentencing trial, finding that there was no suggestion that those who did serve were not impartial. *Ross*, 487 U.S. at 85-86. This Court made clear, however, that the

presence of an ADP juror on the jury would have violated the defendant's constitutional right to an impartial jury. *Id.* at 85.

> Had [the ADP juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the ADP juror] for cause, the sentence would have to be overturned.

Id.[1]

The defendant in *Ross* had the opportunity to discover ADP jurors during voir dire. Thus, the record provided evidence that no ADP juror sat on Ross' jury. By contrast, Morgan's trial judge disallowed questioning to identify ADPs. Thus, one cannot know from review of the record in Morgan's trial how many of Morgan's jurors were ADPs.[2] As discussed

1. There has been no suggestion that the defendant in the instant case failed to preserve this issue for appeal.

2. In deciding Morgan's appeal, the Illinois Supreme Court acknowledged the dictate of *Ross* that the trial court should excuse ADP jurors for cause. *People v. Morgan*, 142 Ill. 2d 410, 469-470, 568 N.E.2d 755, 778 (1991). The Illinois court found, however, that Morgan had failed to show that any juror on his jury was partial. *Id.* The court is silent as to how Morgan could have shown bias without the opportunity to identify ADP jurors through appropriate questioning during voir dire.

Ironically, even without ADP questioning, the record contains strong evidence that the trial court seated at least one ADP juror. After Morgan's counsel had used all of his peremptory challenges, Stuart Ship, a potential juror, arguably identified himself as an ADP in response to a *Witherspoon*-inspired question.

> Q: Would you automatically vote against the death penalty no matter what the facts of the case were?
>
> A: I would not vote against it.

(R. 538). A fair interpretation of the above exchange is that Mr. Ship would vote for the death penalty no matter what the facts of the case were. Had the trial court granted the defense motion for an inquiry whether potential jurors would automatically impose the death penalty, that ambiguity could have been cured. Instead, this probable ADP juror served on Morgan's jury.

more fully below, ADPs do exist in the potential juror pool. Since the presence of an ADP juror on a jury violates a capital defendant's constitutional rights, Morgan had a constitutional right to discover the existence of such jurors during voir dire and to have them excused for cause.

B. The Exclusion Analysis Articulated in *Wainwright v. Witt* Applies Equally to Potential Jurors Who Would Automatically Impose Death to One Convicted of a Capital Crime

Where a juror's view on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," a court may exclude the juror for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)(*citing Adams v. Texas*, 448 U.S. 38 (1980)). In *Witt*, the Court recognized a legitimate interest on the part of the State in excluding jurors whose views on capital punishment would not allow them to view the proceedings impartially, finding that such jurors would frustrate the administration of a State's death penalty scheme. *Id.* at 422-423. Since the State had the obligation to show such bias, the Court condoned voir dire questioning designed to discover it.

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality.

Witt, 469 U.S. at 423 (emphasis added). As then-Justice Rehnquist stated, the "quest" of venire is to find "jurors who will conscientiously apply the law and find the facts." *Id.*

Capital defendants have an even more compelling right to ascertain whether potential jurors will impose a death sentence impartially. Just as the State may identify and request the exclusion of potential jurors who will not, because of personal views, vote for the death penalty, equity demands that the capital defendant have the ability to identify and request the exclusion of potential jurors who will not, because of personal views, vote against the death penalty. In both instances, the trial court only excludes those who will not apply the law.[3] By failing to ask prospective jurors whether they would impose the death penalty automatically, the trial court failed to protect Morgan's constitutional right to an impartial jury.[4]

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[3] Exclusion of ADPs, persons who by definition will not follow the law because they will never vote against the death penalty, is "logically consistent" with exclusion of persons who will not follow the law because they will never vote for the death penalty. *Adams v. Texas*, 448 U.S. 38, 54 (1980) (Rehnquist, J. dissenting). It should be noted that *Witt* gives the State the right to exclude for cause a larger group of anti-death penalty persons, including persons whose personal views would "substantially impair" their ability to vote for the death penalty. 469 U.S. at 423-424. Arguably, complete parity requires the court to allow the defense to indentify and exclude persons with strong pro-death penalty views even when such persons may not be ADPs.

[4] Even the Illinois Supreme Court, in a case decided after its denial of Morgan's appeal, admitted that allowing the defendant to inquire whether an individual would automatically impose the death penalty is the best means of assuring an impartial jury. *People v. Jackson*, 1991 WL 188831 at 31 (Ill. Sept. 26, 1991).

> We do not . . . mean to imply that the "reverse-*Witherspoon*" question is inappropriate. Indeed, given the type of scrutiny capital cases receive on review, one would think trial courts would go out of their way to afford a defendant every possible safeguard. The "reverse-*Witherspoon*" question may not be the only means of ensuring defendant an impartial jury, but it is certainly the most direct. The best way to ensure that a prospective juror would not automatically vote for the death penalty is to ask.

C. Exclusion of ADPs Effectuates the Requirement That Sentencers in Capital Cases Consider Mitigating Circumstances

A jury must consist only of "jurors who will conscientiously apply the law and find the facts." *Witt*, 469 U.S. at 423. "It is beyond dispute" that the law requires sentencers in capital cases to consider mitigating circumstances. *Mills v. Maryland*, 486 U.S. 367, 374 (1988). *See also Penry v. Lynaugh*, 492 U.S. 302 (1989)(failure to instruct the jury to give full effect to the mitigating evidence introduced at trial violates Eighth and Fourteenth Amendments); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982)("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (emphasis in original)); *Lockett v. Ohio*, 438 U.S. 586, 602-609 (1978)(sentencer may not be precluded from considering relevant mitigating evidence). Since jurors who will automatically impose death upon conviction will not consider mitigating evidence and, thus, not follow the law, they must be excluded.

Turner v. Murray, 476 U.S. 28 (1986), provides further instruction on this point. In *Turner*, the trial court refused to question potential jurors about racial prejudice. This Court reversed, ruling that the "qualitative difference" between death and all other punishments constitutionally requires voir dire that seeks to elicit racial prejudice in capital cases. *Id.* at 35. "[E]very capital sentencer must be free to weigh relevant mitigating evidence before deciding whether to impose the death penalty." *Id.* at 34. The risk that racial prejudice may infect the sentencing entitles a capital defendant to have the potential jurors questioned on the issue of racial bias.

> [T]he mere fact that petitioner is black and his victim white does not constitute a "special circumstance" of constitutional proportion. What sets this case apart from *Ristaino [v. Ross*, 424 U.S. 589 (1976), where Court held that voir dire inquiry into racial prejudice was not always required], however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a capital offense.

Id. at 33.[5]

The death penalty views of ADP jurors inhibit their ability to consider mitigating factors just as racial prejudice may inhibit such consideration. Consistent with the ruling in *Turner*, upon the request of the defendant, voir dire must include questions to identify ADP jurors, and such jurors must be excused from service because they will not follow the law.

[5] The Morgan record reflects that the trial judge did not recognize or even acknowledge the "qualitative differences" created by the capital nature of this case. During voir dire the defendant requested that the court remove for cause a juror who thought he might take a negative inference from the defendant's failure to testify. (R. 542). Defense counsel argued that the fact that the case involved the possibility of a death sentence compelled the juror's exclusion. In denying the defense request, the trial court stated:

> I don't care what kind of case this is. I try — I try the case regardless of what the nature of the charges are. My duty, as a judge, is not to base my decisions on the fact that a case is a capital case, or if it is just an ordinary shoplifting case.

(R. 542-543).

II. JUROR RESEARCH REVEALS THE PRESENCE OF AN IDENTIFIABLE AND SIGNIFICANT PORTION OF THE POPULATION WHO WOULD AUTOMATICALLY IMPOSE DEATH

Recent juror studies reveal a significant number of ADPs in the potential juror pool who can be identified through proper questioning. These studies also reveal that a court cannot reliably identify all ADP jurors merely by inquiring whether their views on the death penalty would affect their ability to perform their juror duties in accordance with the law. In one 1987 study the authors reviewed 18 capital murder trials held between 1980 and 1983 in Kentucky, South Carolina and California. Nietzel, Dillehay & Himelein, *Effects of Voir Dire Variations In Capital Trial: A Replication and Extension*, 5 Behavioral Sci. & the Law 467 (1987). They analyzed the relationship between various methods of voir dire and the sustained challenges for cause by defense and prosecuting attorneys. *Id.* at 468. Of 242 defense-inspired, for cause removals, 25.8% of the jurors were removed because questioning revealed them to be ADPs. *Id.* at 473.

In a second 1987 study, the authors asked four questions of 135 randomly selected, registered voters in Fayette County, Kentucky. Neises & Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 Behavioral Sci. & the Law 479 (1987). Two questions addressed the respondents' willingness to vote for the death penalty and their ability to decide fairly the question of guilt. *Id.* at 483. A third question sought to determine the respondents' attitudes toward the death penalty and whether the strength of those attitudes "would seriously affect their ability to perform their duties" as jurors. *Id.* A final question asked whether respondents "would always vote to impose the death penalty for guilty capital defendants." *Id.*

Based on the responses to these questions, the authors calculated that 76.9% of the respondents favored the death penalty while only 22.4% opposed it. *Id.* at 485. Almost one-fourth of the tested population, 32 of the 135 respondents, identified themselves as ADPs. *Id.* at 485-486. Perhaps the most significant finding, however, was that 26 of the 32 ADPs also said that they "would not be substantially impaired or prevented from performing their juror duties despite having also stated that they would always vote for the death penalty for guilty capital defendants." *Id.* at 493. Thus, as the authors concluded, "at least some potential jurors are not aware that failure to consider all punishment options in the penalty phase of the trial is a violation of the juror duties they are expected to perform." *Id.* at 492.

A third study reported the results of a survey of randomly selected persons who had recently served as jurors in non-capital felony cases. Sandys & Dillehay (1987, April). *Juror Qualification Under the New Wainwright v. Witt Standard: A Test of Jurors' Ability To Anticipate Their Role* (paper presented at the meetings of the Southeastern Psychological Association, Atlanta, Ga.). Respondents were classified as "includable" or "excludable" based on their response to the question, derived from *Witt:* "Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?" *Id.* at 4. Only sixteen of the respondents were "excludable" based on their response to that question. *Id.* at 7. Further questioning revealed, however, that "28.6% (42) of the *Witt* includables indicated that they would always give

the death penalty for capital murder, regardless of the evidence." *Id.*[6]

This research demonstrates that a more direct questioning scheme than the trial court allowed in this case is required to identity potential jurors who would automatically impose a death sentence. Without the ability to inquire whether a juror will automatically impose death, the capital defendant is denied his constitutional right to an impartial jury.

III. CAPITAL DEFENDANTS ARE ENTITLED TO A PRESUMPTION THAT SOME POTENTIAL JURORS WILL BE ADPs

Although the above-cited studies provide compelling evidence that ADPs make up a significant portion of potential jurors, this Court need not rely solely on these statistics to reverse Morgan's sentence.[7] In *Witt*, the Court did not require a statistical showing that people whose views on capital

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[6] Two juror studies, reported together in 1988, found lower but still significant percentages of ADPs in their sampled populations. Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 L. and Hum. Behav. 263 (1988). After conducting two surveys of North Carolina jurors, the authors found that 10% of the sampled populations (31 of 325 in Study 1 and 31 of 317 in Study 2) responded that they would always invoke the death penalty for convicted first degree murderers. *Id.* at 270, 273. Even when the authors incorporated this death penalty inquiry into a question about the respondent's ability to follow the judge's instructions, four of the 31 jurors who had said they would always invoke the death penalty continued to express ADP views. *Id.* at 274. Two early studies, which counsel were unable to obtain, appear to indicate a lower but still identifiable percentage of ADPs in the population. Louis Harris & Associates, Inc., Study No. 814002 (1981) (1%); Young, Andrea, Arkansas Archival Study (1981) (.5%).

[7] In *Ross*, the Court recognized that a death sentence must be overturned if a single ADP juror sat on the jury. *Ross*, 487 U.S. at 85.

punishment would substantially impair or automatically preclude their ability to impose a death sentence represented a significant portion of the population. The Court was apparently willing to presume that such potential jurors existed and to accord the State the benefit of that presumption. Capital defendants are entitled to the analogous presumption, *i.e.*, that ADP jurors exist in the potential juror population.

The Court also was not concerned with statistical studies in *Turner v. Murray*, 476 U.S. 28 (1986), where it held that the trial court must ask potential jurors in capital cases about racial bias. Although the Florida Supreme Court had rejected the statistical evidence presented by the defendant, this Court presumed the possibility of juror bias. *Id.* at 37 n.11. "We find it unnecessary to evaluate statistical studies which petitioner has introduced in support of the proposition that black defendants who kill whites are executed with disproportionate frequency." *Id.* The Court's presumption of impact stemmed, at least in part, from "the special seriousness of the risk of improper sentencing in a capital case." *Id.* at 37.

> [T]he risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.

Id. at 36.

Just as the Court was willing to presume the existence of jurors who, because of racial prejudice, would be biased, the Court should presume the existence of ADP jurors. The risk of juror bias caused by the presence of an ADP juror on a capital jury is "unacceptable in light of the ease with which that risk could have been minimized." *Id.* Accordingly, Morgan's sentence must be vacated.

CONCLUSION

For the reasons set forth, *amicus* urges this Court to reverse the judgment of the Illinois Supreme Court and to vacate the sentence.

Respectfully submitted,

National Association of
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Amicus Curiae in Support of
Petitioner

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